

Doc Code: AP.PRE.REQ

PTO/SB/33 (07-09)

Approved for use through 07/31/2012. OMB 0651-0031

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## PRE-APPEAL BRIEF REQUEST FOR REVIEW

Docket Number (Optional)

2002P03767WOUS

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on \_\_\_\_\_

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name \_\_\_\_\_

Application Number

10/520,681

Filed

01/07/2005

First Named Inventor

Ralf Neuhaus

Art Unit

2449

Examiner

Ashokkumar B. Patel

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

☐

applicant/inventor.

/Bryan H. Opalko/

Signature

☐

assignee of record of the entire interest.  
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.  
(Form PTO/SB/96)

Bryan H. Opalko

Typed or printed name

☐

attorney or agent of record.  
Registration number \_\_\_\_\_

412-562-1893

Telephone number

☒

attorney or agent acting under 37 CFR 1.34.

May 17, 2010

Date

Registration number if acting under 37 CFR 1.34 40751

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below\*.

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\*Total of \_\_\_\_\_ forms are submitted.

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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## **CLAIM REJECTIONS**

Claims 8-9, 14-18, 22-25, 28-29 and 31-32 stand rejected under § 103(a) as obvious over U.S. Publication No. 2002/0184357 to Traversat et al. ("Traversat") in view of U.S. Patent No. 6,065,062 to Periasamy et al. ("Periasamy"). (Office Action, 02/18/2010; Advisory Action, 05/07/2010). Applicants filed a Response After Final on April 27, 2010. The claim amendments therein were entered by the Examiner for purposes of appeal. (Advisory Action, 05/07/2010). It is those claims that are being appealed and that are discussed herein.

### **Claims 8-9, 14-18, 22-25, 28-29 and 31-32 are Allowable Over the Cited Art**

Independent claim 8, as amended, recites, *inter alia*:

*wherein each of the communication components searches for neighboring ones of the communication components and creates a servant list of the neighboring communication components; and wherein each of the communication components maintains the current utilization level of each server functionality of the neighboring communication components in the servant list by performing a repeating search at timed intervals.*

Similarly, independent claim 16, as amended, recites, *inter alia*:

*wherein each of the communication components searches for neighboring ones of the communication components and creates a servant list of the neighboring communication components; and wherein each of the communication components maintains the current utilization level of each server functionality of the neighboring communication components in the servant list by performing a repeating search at timed intervals.*

Neither Traversat nor Periasamy, taken alone or in combination, disclose or suggest these claim limitations.

In the Office Action (02/18/2010), paragraphs [0083] and [0176] of Traversat are cited as allegedly disclosing the above limitations. In the Advisory Action (05/07/2010), paragraphs [0083], [0114], [0128], [0477], [0478], [0124], [0125], [0126] and [0127] are cited as allegedly disclosing the above limitations. However, all of these paragraphs of Traversat recite very generic and vague functionality that in no way discloses the claimed limitations. Such generic and vague disclosures cannot support the obviousness rejections in the Office Action (02/18/2010) and in the Advisory Action (05/07/2010), which simply ignore the claim limitations and provide

no rationale of how the generic and vague disclosures can possibly teach the specific claim limitations.

In Traversat:

Paragraph [0083] discloses a peer monitoring 128 primitive that is part of a core layer 120 and is common to peer-to-peer networking. (*See also Traversat*, paragraph [0079]).

Paragraph [0176] simply recites: "Simple, low-cost information search and indexing using a content shared service." This is all this paragraph recites, and is a vague and generic disclosure.

Paragraph [0114] discloses that peers may publish and provide network resources that may be used by other peers, and that a peer may optionally cache information. Publishing resources, such as server functionalities, is a common occurrence in peer-to-peer networking, which is admitted by Applicants in paragraph [0012] of the published application.

Paragraph [0128] discloses that a peer group may permit peers to monitor a set of peers for any special purpose. This is a vague statement that there may be some type of monitoring done within a peer group. There is no definition for "as set of peers".

Paragraphs [0477]-[0480] disclose generally peer monitoring and metering. Peer monitoring can keep track of a peer's status. Peer metering can accurately account for a peer's activities. Paragraph [0480] discloses that a peer can query another peer for data, such as up time and amount of data handled. However, no definition is provided for "another peer". Furthermore, there is no indication of whom or what is doing the monitoring and metering. The only suggestion is found at paragraph [0480] where a peer can query another peer for up time and data handled. One on one peer querying is not what is claimed.

Paragraph [0124] discloses forming and organizing peer groups based on the mutual interest of peers. This is a generic statement, and Applicants do not see how it has any bearing on the claimed invention. Applicants' invention is not directed at forming peer groups.

Paragraph [0125] discloses that peer group geographical boundaries may define a search scope when searching for a group's content. This is a generic statement, and Applicants do not see how it has any bearing on the claimed invention. Applicants' invention is not directed at geographical boundaries.

Paragraph [0126] discloses that peer groups may be formed based on proximity of member peers, and that proximity-based peer groups may subdivide the network into abstract

regions, which may serve as placeholders for general communication. This is a generic statement, and Applicant's do not see how it has any bearing on the claimed invention. Applicant's invention is not directed at forming peer groups.

Paragraph [0127] discloses that peer group boundaries permit member peers to access and publish protected content, and that peer groups form virtual secure regions which boundaries limit access to the peer group resources. This is a generic statement, and Applicant's do not see how it has any bearing on the claimed invention. Applicant's invention is not directed at forming peer groups or setting up secure boundaries.

While Traversat may disclose basic functionalities of peer monitoring and/or metering, it is devoid of any disclosure or suggestion of how the peer monitoring/metering performs any functionality to accomplish the basic disclosed tasks and, more importantly, is devoid of any disclosure or suggestion of the claim limitations that Traversat allegedly discloses, namely:

- 1. Searching for neighboring ones of the communication components;*
- 2. Creating a servant list of the neighboring communication components; and*
- 3. Maintains the current utilization level of each server functionality of the neighboring communication components in the servant list by performing a repeated search at timed intervals.*

In the Response After Final, Applicants described the operation of the above-identified claim limitations. (See Response After Final, 04/27/2010, pages 11-12). Traversat is devoid of any teaching or suggestion of searching "neighboring" communication components to create servant lists, and updating those servant lists with the current utilization level of each server functionality at timed intervals. As described in the present application, a "neighboring" component is one that is connected directly to another component. (See Published Application, paragraph [0031]). A peer group in Traversat may be infinite. Traversat makes no distinction between neighboring components and other components. For example, at paragraph [0082], Traversat states that "[a] peer group may theoretically be as large as the entire collected universe." It is for this reason that while query messages may be forwarded from one rendezvous node, or peer, to another, Traversat implements a "time-to-live", or time-out parameter to limit query forwarding. (See Traversat, paragraph [0028]). When the time-to-live indicator expires, the discovery query message is deleted or invalidated. This prevents a query in Traversat from being forwarded indefinitely.

In contrast, the present invention queries only neighboring components to create a servant list. Components that are not neighboring, in the sense as used in the present application, will not be queried, but will be included in other components' servant lists for which they are a "neighbor". Since the claimed invention queries only "neighboring" components, there is no threat of an indefinitely running query. The servant lists are updated to reflect the current utilization level of each server functionality of the neighboring communication components by performing a repeated search at timed intervals. The Office Action ignores these limitations and does not provide the requisite reasoning and rationale to support an obviousness rejection.

The general and vague teachings of Traversat cannot support an obviousness rejection. There is no disclosure of how Traversat performs any monitoring and metering; just that it does. "[R]ejections on obviousness cannot be sustained by mere conclusory statements; instead, **there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.**" KSR International Co. v. Teleflex Inc., 550 U.S.398, 419, 82 USPQ2d, 1385, 1396 (2007) (*citing In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006) (*emphasis added*)); MPEP § 2143.01. The rejections are a classic case of improper hindsight reconstruction, where the Examiner has taken very generalized and vague teachings of Traversat and has read into the prior art the teachings of the invention at issue. The law is clear that hindsight reconstruction is improper. *See Graham v. John Deere Co.*, 383 U.S. 1, 36 (1966); In re Fritch, 23 USPQ2d 1783, 1784 (Fed. Cir. 1992); KSR International, 550 U.S. at 421. Because the Office Action does not specifically address the claim limitations of independent claims 8 and 16 discussed above, the obviousness rejection is improper and should be withdrawn.

Thus, independent claims 8 and 16, as well as claims 9, 14-15, 28-29 and 17-18, 22-25, 31-32 which depend cognately from claims 8 and 16, respectively, are believed allowable.